tion provision, and after considering the provisions in the Ordinance such as the requirement of keeping a register of moneylenders (s 2(2)), the registration of documents of debt in court (s 3(1)), the noting of payments in the register of deeds (s 7(1)), it is in my opinion for the court to decide in each case whether a person or company is a 'moneylender' within the ambit of the said Ordinance depending on all the particular facts and circumstances of each case. So far as the evidence goes in the instant case, there is only one isolated transaction ie the one between the parties herein now called into question. On the evidence as adduced, I am of the opinion that the defendant has failed to discharge the onus of establishing on a balance of probabilities that the plaintiff is a 'moneylender' within the ambit of the Moneylenders Ordinance and that the Ordinance applies to the impugned transaction between the parties. Accordingly, all the contentions of the defendant fail. The claims of the defendant are dismissed. The plaintiff is entitled to the relief as sought. There will be an order:

(1) For sale of the land in question as prayed for in prayer (a) of the originating summons by public auction under the directions of this court to satisfy the sum of $51,300 with interest at 12% pa from 1 May 1986 until sale or payment whichever is the earlier.
(2) That the money to arise from such sale be lodged in court to the credit of this action pending further order.
(3) Costs of the action be paid by the defendant to the plaintiff. In the absence of an agreement between the parties, such costs are to be taxed.
(4) There be liberty to apply.

Order accordingly.

Solicitors: *David Teng & Co*; *Teo & Co.*

Reported by *Ng Sheau Jiuan*

Philip Lau Chee Heng v Public Prosecutor

HIGH COURT (SIBU) – CRIMINAL APPEAL NO 9 OF 1987
CHONG SIEW FAI J
23 MARCH 1988

Criminal Procedure – Sentencing – Life imprisonment and whipping mandatory for offence punishable under s 4 of Firearms (Increased Penalties) Act 1971 – Whether mandatory – Principles applicable – Firearms (Increased Penalties) Act 1971, s 4

Criminal Procedure – Powers of revision of court – Discretionary power – General rule applicable as to enhancement of sentence

Words and Phrases – 'And' – 'Shall be punished with' – 'Imprisonment for life' – Firearms (Increased Penalties) Act 1971, s 4

The appellant pleaded guilty to the offence of exhibiting a firearm in a manner likely to put any person in fear of death at the time of committing a robbery. He was sentenced to three years' imprisonment and six strokes of whipping. The appellant appealed against the sentence, contending that the imposition of six strokes of whipping is manifestly excessive. Arising from the appeal, the Public Prosecutor also sought a revision of the case submitting that the sentence of three years' imprisonment was unauthorized by law and illegal in view of the mandatory sentence imposed by s 4 of the Firearms (Increased Penalties) Act 1971 ('the Act').

Held, dismissing the appeal and allowing a revision of the case:
(1) The penalty of imprisonment for life and whipping of not less than six strokes under s 4 of the Act, are, upon conviction, mandatory. The sentence of life imprisonment is a fixed one and is not the maximum that may be awarded so that a lesser sentence of imprisonment may be imposed. An imprisonment term of three years is clearly wrong and unsustainable.

(2) While the general rule is that the High Court in revision does not enhance a sentence even though illegality was committed by the lower court where the sentence passed involves substantial punishment, the court would have to act where the sentence is improper and is not in accordance with the law.

(3) Having regard to the mandatory sentence enacted in s 4 of the Act and having considered the facts which fell within that section, the three-year imprisonment sentence is clearly improper and unauthorized by or not according to law. The three-year sentence is altered to one of life imprisonment, and the mandatory six strokes of the whip are affirmed.

Cases referred to
1 *PP* v *Man bin Ismail* [1939] MLJ Rep 161 (refd)
2 *PP* v *Lee Ah Sam* [1949] MLJ 236(distd)
3 *Ng Chwee Puan* v *R* [1953] MLJ 86 (refd)
4 *Khor Seek Pok* v *PP* [1958] MLJ 170 (refd)
5 *PP* v *Wahab* [1964] MLJ 265 (refd)
6 *Darus* v *PP* [1964] MLJ 322 (refd)
7 *Jayanathan* v *PP* [1973] 2 MLJ 68 (refd)
8 *Nili Anak Gumbang & Ors* v *PP* [1985] 1 MLJ 464 (refd)
9 *PP* v *Mohamed Nor & Ors* [1985] 2 MLJ 200 (distd)
10 *Emperor* v *Lachiram* ILR 28 Bom 533 (refd)
11 *Liaw Kwai Wah & Anor* v *PP* [1987] 2 MLJ 69 (SC) (refd)

Legislation referred to
Criminal Procedure Code ss 173(m)(2), 294
Emergency Regulations 1948 reg 5(1)
Firearms (Increased Penalties) Act 1971 ss 2(1), 4
Interpretation Act 1967 ss 2(3), 60
Penal Code ss 298A, 396

Appeal from: Criminal Case No SC/5/87 (Sessions Court, Sibu)

Mat Ghani bin Abdullah (Legal Aid Bureau) for the appellant.
Siti Aisha bte Othman (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Chong Siew Fai J: In this case the appellant appeals against sentence. Initially, he was unrepresented. On his own plea of guilty to the offence of exhibiting a firearm, ie a shotgun in a manner likely to put any person in fear

of death at the time of committing a robbery on 26 September 1986, he, on 16 May 1987, was sentenced to three years' imprisonment and six strokes of whipping.

Briefly, the facts of the case were that on 26 September 1986 at about 12 noon the appellant together with three other persons arrived at the Hock Huo Lung Shell Station (petrol station) at Jakar, Sarikei, by a car intending to rob the petrol station. Upon arrival, one of them requested that the petrol tank of their car be filled with petrol, which was done. As they had insufficient money, only part of the price was paid. The three of them then left to find a friend to get more money leaving the appellant at the petrol station. They did not find the friend. Upon their return and upon being demanded by the petrol station owner for the balance of the price, the appellant replied that he had no money. The appellant then took out from the car a shotgun. Whilst shouting that the gun was real, he loaded it with cartridge. At that stage, the petrol station owner was scared and walked away. The appellant then fired the weapon hitting the glass wall of the office of the petrol station. In so doing, the appellant pointed the gun in the direction of a petrol station attendant who sat on a chair in front of the petrol station. The attendant then locked the drawer of a table in which money was kept and fled. After shouting for the key to which the owner replied that there was none, one of the members of the gang slashed the drawer of the table with a 'samurai sword'; and the appellant forced open the drawer and took away $515 cash. They then left. The same afternoon they were arrested. The shotgun was stolen by one of them the previous day.

In the appellant's own notice of appeal against the sentence, the ground put forward is that the imposition of six strokes of whipping is manifestly excessive. In addition, he has also put forward, in his letter dated 9 July 1987, a number of factors which are personal in nature and which I do not propose to repeat here save to say that I have fully considered them.

Arising from the appeal, the learned Public Prosecutor wrote seeking revision of the case submitting that the sentence of three years' imprisonment was unauthorized by law and illegal in view of the mandatory sentence imposed by s 4 of the Firearms (Increased Penalties) Act 1971.

So far as is relevant, s 4 of the said Act provides:

> Any person who at the time of his committing ... robbery exhibits a firearm in a manner likely to put any person in fear of death or hurt shall be punished with imprisonment for life and with whipping with not less than six strokes.

In view of the seriousness of the matter, I, on 2 November 1987, adjourned the hearing to enable the appellant to have the benefit of legal representation. As a result, the appellant was represented by Encik Wan Mohamed Wan Ibrahim from the Legal Aid Bureau and a petition of appeal containing grounds of appeal was admitted and argued without objection from the deputy public prosecutor Encik Abdul Rahman bin Sebli.

For the appellant, it was contended that the learned trial president had failed to appreciate the legal meaning of the word 'and' in s 4 of the Firearms (Increased Penalties) Act 1971 and had erred in law in holding that the sentence of life imprisonment and whipping of not less than six strokes were mandatory.

A number of authorities were cited on behalf of the appellant: *PP* v *Man bin Ismail*;[1] *PP* v *Lee Ah Sam*;[2] *Ng Chwee Puan* v *R*;[3] *Khor Seek Pok* v *PP*;[4] *PP* v *Wahab*;[5] *Darus* v *PP*;[6] *Jayanathan* v *PP*;[7] and *Nili Anak Gumbang & Ors* v *PP*.[8]

With respect, all the above cases are on penal provisions in which the words 'shall be liable to' are used in contrast to s 4 of the Firearms (Increased Penalties) Act 1971 where the phrase is 'shall be punished with ... and with ...' Those cases are, to my mind, clearly distinguishable.

The case of *PP* v *Lee Ah Sam*,[2] however, needs a little detailed discussion. There, Willan CJ in considering the penal provision of reg 5(1) of the Emergency Regulations 1948 said:

> Finally, a comparison with the rather stronger wording of s 396 of the Penal Code confirms our view that the whipping under reg 5(1) is discretionary. The relevant words of s 396 are 'shall be punished with death or penal servitude for life ... and ... with whipping with a cat-o'-nine tails'. It has never been suggested that the whipping under that section is mandatory and in our opinion it is not.

Relying on the above passage, counsel for the appellant forcefully argued that the word 'and' in s 4 of the Firearms (Increased Penalties) Act 1971 must mean 'or' and the form of penalty was discretionary. In *Lee Ah Sam's* case[2] the said s 396 did not appear to have been fully argued. Also, if one examines more closely the said s 396, it will be noted that the death penalty prescribed there is with the alternative of 'or penal servitude for life ....' This bore resemblance to the Emergency Regulations reg 5(1) (ie ... 'punished with death or with penal servitude for life and whipping') which was called into question in *Lee Ah Sam's* case,[2] but is different from s 4 of the Firearms (Increased Penalties) Act 1971 which provides no alternative form of penalty.

Counsel for the appellant also cited *PP* v *Mohamed Nor & Ors*[9] and argued that the legal effect of the phrases 'shall be liable to' and 'shall be punished with' was the same and that despite the use of the words 'shall be punished with', the court still had discretionary power in meting out sentences. The case of *Mohamed Nor & Ors*[9] was on s 298A of the Penal Code as then existing, ie

before the amendment by Act A614/85. In the unamended form, it, unlike the instant case before me, provided for alternative forms of sentences of imprisonment (which might extend to three years), or fine or both. Moreover, s 294 of the Criminal Procedure Code (relating to first offenders) was not then excluded from application. In that case the trial court had seen it fit to apply s 294 and on appeal the Supreme Court refused to interfere. In our instant case, the question of applicability of the said s 294 is not in issue. It was not even raised. In any event, the said section is clearly inappropriate for application having regard to all the facts and circumstances in the instant case. It is also my view that there is clear distinction between the phrases 'shall be liable to' and 'shall be punished with'.

On the question of imprisonment for life, counsel for the appellant also referred to s 60 of the Interpretation Act 1967 which provides:

> A written law which prescribes a penalty for an offence shall be construed as providing that the offence shall be punishable on conviction by a penalty not exceeding the penalty prescribed.

However, this 1967 Act is not applicable where there is (a) express provision to the contrary; or (b) something in the subject or context inconsistent with or repugnant to its application (see s 2(3) of the Act).

In the Firearms (Increased Penalties) Act 1971, apart from s 4 thereof providing 'shall be punished with imprisonment for life and with whipping with not less than six strokes', the term 'imprisonment for life' also has its special meaning and excludes all other written law providing to the contrary. It reads: 'imprisonment for life' means, notwithstanding s 3 of the Criminal Justice Ordinance 1953 and any other written law to the contrary, imprisonment for the duration of the natural life of the person sentenced (see s 2(1) of the 1971 Act).

Moreover, in view of the statutory meaning of the term 'imprisonment for life' as provided ie imprisonment for the duration of the natural life of the person sentenced, I fail to see how a discretionary imprisonment sentence for a fixed term commensurate with the gravity of the offence committed could be imposed since it is impossible to ascertain with certainty the time the natural life of a person would end. This, in my opinion, strongly argues for the view that the life imprisonment sentence as defined is mandatory. The sentence of imprisonment for life in my opinion is a fixed one and is not the maximum that may be awarded so that a lesser sentence of imprisonment may be imposed.

After considering all matters including submissions by counsel, I am of the view that the penalty imprisonment for life and whipping of not less than six strokes under s 4 of the Firearms (Increased Penalties) Act are, upon conviction, mandatory. In this connection, I would point out in fairness to counsel for the appellant that it was conceded that if whipping was held to be mandatory, six strokes would be the minimum.

In the view that I hold of the penalty being mandatory, grounds (iii) and (v) contained in the petition of appeal must fail. I am also of the view that there is no merit in ground (iv) of the appeal. The learned Sessions judge was correct in taking public interest into consideration. Furthermore, in view of the mandatory punishment as I hold, an imprisonment term of three years is clearly wrong and unsustainable.

The language of s 4 of the said 1971 Act is clear. It imposes a sentence of life imprisonment and whipping of not less than six strokes. In the result, the appeal of the appellant on the grounds as submitted must be dismissed.

I now come to the question of revision. It cannot be disputed that the power of revision of this court is a discretionary power. No argument was advanced in this respect. In *Emperor* v *Lachiram*[10] Jenkins CJ, speaking of the guiding principles for the exercise of the revisionary powers, said:

> this controlling power of the court is a discretionary power and it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances, which vary greatly.

In *Liaw Kwai Wah & Anor* v *PP*[11] Abdul Hamid CJ said (at p 70):

> The High Court's power sitting in revision is discretionary. As it is, it must therefore be exercised judicially and within the limits and in the spirit of the legislation.

At p 71:

> The law is clear in that the Public Prosecutor is vested with a right to appeal against any sentence which he feels is manifestly inadequate. The power of revision is therefore to be used sparingly and should remain a discretionary power to be exercised primarily for purposes of correcting a miscarriage of justice.

While the general rule is that the High Court in revision does not enhance a sentence even though illegality was committed by the lower court where the sentence passed involves substantial punishment, the court nevertheless would have to act where the sentence is improper and is not in accordance with law. Section 173(m)(2) of the Criminal Procedure Code requires lower courts to pass sentences according to law.

In the instant case, having regard to the mandatory sentence enacted in s 4 of the said Act and having considered the facts which were admitted by the appellant and which fell within the said s 4, the three-year imprisonment sentence, in my view, is clearly improper, and unauthorized by or not according to law. In the result, I am constrained by the said s 4 to alter the three-year jail

sentence to one of life imprisonment. The sentence of three years' imprisonment by the lower court is set aside. The mandatory six strokes of the whipping are affirmed.

Finally, I would make an observation. Some time ago, arising out of an appeal involving abetment of robbery with the use of firearms (Sibu Criminal Appeal No 11 of 1985), I had occasion to come across a connected case also involving robbery with the use of firearms (Sibu Sessions Court Criminal Case No SC/14/84). Though the facts and circumstances in the latter case abovementioned appears no less serious than those in the instant case, the accused was charged under a different law attracting lesser punishment. I wish to make it absolutely clear that in so commenting I am not in any way levelling criticism on anyone. Indeed, there might well be adequate reasons justifying different treatment of the two cases. I mention this in order that the matter would be given such due consideration as it might perhaps deserve should there come a time when the executive power of clemency is pleaded in aid. Of course, valid reasons, if any, (of which I have no knowledge) for treating the two cases differently cannot be ignored.

Appeal dismissed.

Reported by *Ng Sheau Jiuan*

Re Low See Kim

HIGH COURT (KUANTAN) – ORIGINATING MOTION NO 32-17-87
LAMIN J
12 FEBRUARY 1988

Administrative Law – Leave to apply for certiorari and mandamus – Application for – Rejection of application for retail licence and public house licence by Lembaga Pelesenan dan Exsais – Whether statutory remedies must first be exhausted – Discretion of court in granting judicial review – Excise Act 1976, s 35(7)

On 28 October 1987, the applicant submitted an application for a retail licence and public house licence. On 28 November 1987, the Pengerusi Lembaga Pelesenan dan Exsais wrote to inform him that his application had been rejected. The letter also informed him that if he was not satisfied with the decision of the Lembaga, he may, within 30 days, appeal to the minister as provided under s 35(7) of the Excise Act 1976. The applicant did nothing and only after 24 days had passed (ie on 22 December 1987), he filed a notice of originating motion asking the court for leave to apply for orders of certiorari and mandamus against the Lembaga's decision.

Held, dismissing the application: (1) The remedy by way of judicial review is still a matter of discretion for the High Court but it will be available in only exceptional circumstances.

(2) In the present case, in view of s 35(7) of the Excise Act 1976, the applicant must first exhaust the remedies under the statute.

(3) The applicant has not proved mala fides on the part of the Lembaga when rejecting the present applicant for those licences.

(4) The facts relating to the present application do not constitute such an exceptional circumstance as to justify a grant of the remedy prayed for.

[*Editorial Note*: The applicant appealed to the Supreme Court vide Supreme Court Civil Appeal No 53 of 1988. The appeal was heard on 18 April 1988 and dismissed with costs.]

Case referred to
1 *Government of Malaysia & Anor* v *Jagdis Singh* [1987] 2 MLJ 185 (folld)

Legislation referred to
Excise Act 1976 s 35(1), (7)

S Sivasubramanian (*Wong Fook Leong* with him) for the applicant.
Vong Soh Fah (Federal Counsel) for the respondent.

Cur Adv Vult

Lamin J: In this case, the applicant submitted his application for the retail licence and public house licence on 28 October 1987, for the period 1 January 1988 to 30 June 1988, to the Pengerusi Lembaga Pelesenan dan Exsais for the District of Pekan, Pahang. On 23 November 1987, he wrote to the Pengerusi Lembaga Pelesenan dan Exsais, appealing to them to issue the licences applied for, giving his reasons in support. On 28 November 1987, he received a letter from the District Officer, Pekan informing him that his application had been rejected at a meeting of the Lembaga Pelesanan dan Exsais sitting on 26 November 1987. The said letter also indicated that if he was not satisfied with the decision of the Lembaga, he may appeal to the minister as provided under s 35(7) of the Excise Act 1976.

Sub-section (7) of s 35 reads:

> Any person aggrieved by the decision of the licensing board may within 30 days of being notified of the decision appeal therefrom to the minister whose decision shall be final.

In the case of *Government of Malaysia & Anor* v *Jagdis Singh*,[1] Tan Sri Hashim Yeop A Sani SCJ, delivering the judgment of the Supreme Court, dealt with the question as to whether domestic remedies must first be exhausted if such remedies were available. The learned judge examined a series of authorities and at p 189 he said:

> A clear principle is reiterated here, ie it is not a rigid rule that whenever there is appeal procedure available to the applicant, he should be denied judicial review. Judicial review is always at the discretion of the court but where there is another avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances.